UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

TIMOTHY ADAM MASHBURN

Debtor

No. 96-14871
Chapter 7

MEMORANDUM

This chapter 7 case is before the court upon a motion to dismiss filed on behalf of American General Finance, Inc., for improper venue. The debtor resides in the state of Georgia and has for at least the past one hundred eighty (180) days immediately preceding the commencement of this case. His home is approximately five (5) miles from the bankruptcy courthouse in Chattanooga, Tennessee. It is approximately one (1) hour driving time from his home to the bankruptcy court in Rome, Georgia. Most of his debts have arisen in Georgia. None of the Georgia creditors objected to venue in the Eastern District of Tennessee. The office from which debtor borrowed money from American General Finance is located in Tennessee. American General Finance is the only objecting creditor. This is a no-asset case, and the trustee has fully administered the case.

Before 1984 there were two statutes that dealt with change of venue of bankruptcy cases. The change of venue statute applied to cases pending in the right venue. 28 U.S.C. § 1475 (1979); *Pereira v. New Jersey Bank (In re Rodriguez)*, 29 B.R. 896, footnote 3 at 899 (Bankr. E. D. N. Y. 1983). The cure or waiver statute applied to cases pending in the wrong venue. 28 U.S.C. §

1477 (1979); *McLean v. First National Bank (In re Neese)*, 12 B.R. 968 (Bankr. W. D. Va. 1981). The cure or waiver statute expressly allowed the court to retain a bankruptcy case in the wrong venue in the interest of justice and for the convenience of the parties.

The 1984 amendments to Title 28 repealed and did not replace the cure or waiver statute that expressly dealt with bankruptcy cases. Pub. L. No. 98-353 § 113 (1984); Pub. L. No. 95-598 §§ 402(b) & 241 (1978). This has led many courts to decide that they no longer have the authority to retain a bankruptcy case in the wrong venue. *See, e.g., In re Deabel,Inc.*, 193 B.R. 739, 742 (Bankr. E. D. Pa. 1996); *In re Sporting Club at Illinois Center*, 132 B.R. 792 (Bankr. N. D. Ga. 1991); *In re Petrie*, 142 B.R. 404 (Bankr. D. Nev. 1992); *In re Standard Tank Cleaning Corp.*, 133 B.R. 562 (Bankr. E. D. N. Y. 1991); *In re Pick*, 95 B.R. 712 (Bankr. D. S. D. 1989); *In re Berryhill*, 182 B.R. 29 (Bankr. W. D. Tenn. 1995).

A few sentences of legislative history suggest that the cure or waiver statute for bankruptcy cases was repealed so that the cure or waiver statute for civil cases, 28 U.S.C. § 1406, would apply.

> . . . Certain other sections of the 1978 Act have been deleted entirely. These include . . . section 1477 dealing with cure of waiver of defects . . . .
>
> Sections 1476, 1477, and 1479 of the 1978 act were repetitive of other provisions of Federal law. . . .

S. Rep. No. 55, 98th Cong., 1st Sess. 19-20 (1983).

Compared to the cure or waiver statute for bankruptcy cases, § 1406 greatly restricts the court's options as to venue. The cure or waiver statute allowed the court to retain a case in the wrong venue or transfer it to any other district in the interest of justice and for the convenience of the parties. 28 U.S.C. § 1477 (1979). Section 1406 allows the court to retain a case in the wrong venue only if the objection to venue has been waived. It allows transfer only to a court where venue will be correct.

Section 1406 adds the option of dismissal instead of transfer; the repealed cure or waiver statute did not allow dismissal of a bankruptcy case solely on the ground of incorrect venue. 28 U.S.C. § 1406; *Griggs v. Kirk (In re Griggs)*, 679 F.2d 855 (11th Cir. 1982); *Herman Cantor Corp. V. Cattle King Packing Co. (In re Herman Cantor Corp.)*, 22 B.R. 604 (Bankr. E. D. Va. 1982).

Thus, the 1984 amendments made a major change in the law if they made § 1406 apply to bankruptcy cases. This is especially true with regard to the court's authority to retain a bankruptcy case in the wrong venue. The repealed cure or waiver statute for bankruptcy cases only took effect in 1979. Pub. L. No. 95-598 §§ 402(b) & 241 (1978). The courts had the authority since 1952 to retain a bankruptcy case in the wrong venue if retention was justified by the interest of justice. 2A *James W. Moore, et al., Collier on Bankruptcy* ¶ 32.01[1] at pp. 1313-1314 (14th ed. 1978).

The quoted legislative history can be interpreted to reach a different result. Before the 1984 amendments, the court's options in a bankruptcy case were the same for cases in the right

venue and cases in the wrong venue. The court could retain the bankruptcy case or transfer it to any other court in the interest of justice and for the convenience of the parties. 28 U.S.C. § 1475 (1979); 28 U.S.C. § 1477 (1979); *In re E & S Dairy, Inc.*, 40 B.R. 854, 858 (Bankr. N. D. Ala. 1984); *In re Landmark Capital Co.*, 19 B.R. 342 (Bankr. S. D. N. Y. 1982). This system made cure and waiver basically meaningless in bankruptcy cases. Waiver was required for the district court to retain a civil case in the wrong venue but was not required for the court to retain a bankruptcy case in the wrong venue; the court could retain a bankruptcy case in the interest of justice and for the convenience of the parties. In a civil case, the district court could cure the problem of incorrect venue by dismissing the case or transferring it to the correct venue. Neither of these options was required in a bankruptcy case. The court could retain the case in the wrong venue or transfer it to any other court in the interest of justice and for the convenience of the parties. Dismissal was not allowed. In summary, the cure or waiver statute for bankruptcy cases basically repeated the rules laid down by the change of venue statute for bankruptcy cases. The cure or waiver statute could have been deleted, and the change of venue statute left to deal with cases in the right venue and the wrong venue.

The quoted legislative history makes more sense if this is what Congress did: it deleted the cure or waiver statute for bankruptcy cases as repetitive of the change of venue statute for bankruptcy cases. The cure or waiver statute for bankruptcy cases certainly was not repetitive of § 1406 as suggested by the quotation from the legislative history. The two statutes established very different rules for civil cases and bankruptcy cases. The differences were too obvious for anyone to think that the cure or waiver statute for bankruptcy cases merely repeated for bankruptcy cases the rules of § 1406 for civil cases.

An argument can be made that § 1406 should apply because it is the more specialized statute. Section 1406 is a general statute for all kinds of civil cases, but it is limited to cases pending in the wrong venue. Does this limitation make it more specialized than the change of venue statute specifically for bankruptcy cases? The court thinks not. The conclusion that § 1406 is more specialized depends on an unstated assumption: there must be separate statutory provisions to deal with change of venue — one for cases pending in the right venue and another for cases pending in the wrong venue.

This assumption has a relatively short history to support it. In 1948 Congress enacted a change of venue statute and a cure or waiver statute for civil cases. 15 Charles A. Wright, et al., *Federal Practice & Procedure 2d* §§ 3827 & 3841 (1986). In 1978 Congress enacted a change of venue statute and a cure or waiver statute for bankruptcy cases. Pub. L. No. 95-598 § 241 (1978). To the extent the legislative history of the 1984 amendments suggests that § 1406 applies to bankruptcy cases, it also suggests that Congress was acting on this assumption. The legislative history, however, is unclear.

The sentences quoted earlier came immediately after a paragraph suggesting that Congress did not intend to make any major change in the law:

> . . . In keeping with its policy of generally preserving the structure and substance of the 1978 Act, the Committee makes very few changes in current venue provisions. Sections 1472, 1473, 1474, and 1475 are virtually identical to corresponding sections of the 1978 Act, with the exception of providing for venue in the district courts rather than in the bankruptcy courts. It should also be noted that section 1475 regarding change of venue has been slightly modified to provide for such a change "in the interest of justice or for the convenience of

> the parties." Present law uses the conjunctive "and," while the Committee bill lists these considerations as alternative grounds for a change of venue. It is the view of this Committee that, in light of the broad in personam jurisdiction which Federal courts possess in the bankruptcy area, largely as a result of the 1978 Act, district courts should always give careful consideration to the convenience of the parties in determining whether a change of venue is desirable.

S. Rep. No. 55, 98th Cong., 1st Sess. 19-20 (1983).

Another statement in the legislative history does not reveal any intent to make a major change in the law: "The Senate substitute also contains another provision originally in S. 1013 which pertains to change of venue. It would allow a district court to transfer a case or proceeding in the interest of justice or for the convenience of the parties." 130 Cong. Rec. D684 (daily ed. May 21, 1984).

In summary, the court has not found convincing evidence that Congress, when it passed the 1984 amendments, was acting on the assumption that there must be separate statutory provisions for bankruptcy cases in the right venue and for bankruptcy cases in the wrong venue. Therefore, the court will not impose such a limitation on Congress. Congress may have left one statute, the change of venue statute for bankruptcy cases, to deal with cases pending in the right venue and the wrong venue.

This result has much to recommend it. It leaves the law essentially the same as it was before the 1984 amendments. The change of venue statute says the court may transfer a bankruptcy case in the interest of justice or for the convenience of the parties. 28 U.S.C. § 1412. The use of "may" gives the court the power to retain a case despite incorrect venue. The same wording was

used in § 32b of the prior bankruptcy law; it was interpreted to allow the court to retain a case in the wrong venue in the interest of justice. 11 U.S.C. § 55b (1978); *Bass v. Hutchins*, 417 F.2d 692 (5th Cir. 1969); *In re Bankers Trust*, 403 F.2d 16 (7th Cir. 1968); *In re S.O.S. Sheet Metal Co.*, 297 F.2d 32 (2d Cir. 1961) (per curiam) *aff'g In re Hudik-Ross Co.*, 198 F.Supp. 695 (S.D.N.Y. 1961); *In re Eatherton*, 271 F.2d 199 (8th Cir. 1959); 2A *James W. Moore, et al., Collier on Bankruptcy* ¶ 32.01[1] (14th ed. 1988). Congress at one time considered using "may" in § 1406 for the same purpose. 1 James W. Moore , *Moore's Federal Practice 2d* ¶ 0.146[4] (1988). Thus, the change of venue statute gives the court the same options as before the 1984 amendments. The court can retain the case or transfer it to any other district, whichever option is in the interest of justice or for the convenience of the parties.

Of course, it is possible that Congress intended to make § 1406 apply to bankruptcy cases because it mistakenly thought the law would be essentially the same. Or, the drafters of the 1984 amendments wanted to make bankruptcy cases subject to the stricter rules of § 1406 but did not make a plain statement that this would be a major change in the law. In either case, the court can say that Congress did not intend a major change in the law.

In light of the unclear legislative history, the court sees no need to find that Congress made a major change in the law. The statutes now in effect lead to the conclusion that Congress made no substantial change in the law. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 77 S.Ct. 787, 4 L. Ed.2d 786 (1957); *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988); *Kelly v. Robinson*, 479

U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986). The wording of the change of venue statute for bankruptcy cases does not limit it to cases in the right venue; it can also apply to cases in the wrong venue. There is no longer a separate statute that deals specifically with bankruptcy cases pending in the wrong venue. As a result, logic no longer requires the court to hold that the change of venue statute applies only to bankruptcy cases pending in the right venue. The court has found no convincing reasons — no rules of statutory construction and no clear statement of Congressional intent — for preferring § 1406 over the change of venue statute for bankruptcy cases. The court concludes that the change of venue statute for bankruptcy cases applies. It allows the court to retain the case in the interest of justice or for the convenience of the parties. *In re Lazaro*, 128 B.R. 168 (Bankr. W.D. Tex. 1991).

Bankruptcy Rules 1014(a)(1) and (a)(2) are identical except that (a)(2) allows the court the option of dismissing the case. Neither expressly states that the case be retained, but the option to retain is necessarily implied in two identical sentences. Fed. R. Bankr. P. 1014(a)(2); 28 U.S.C. § 2075; 28 U.S.C. § 1412.

The court concludes that it should retain the case in the interest of justice and for the convenience of the parties despite the incorrect venue. The court will enter an order denying the motion. The debtor will receive his discharge.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

entered 10/16/1997

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 96-14871
Chapter 7

TIMOTHY ADAM MASHBURN

Debtor

ORDER

In accordance with the Memorandum entered by the court,

It is ORDERED that the motion by American General Finance, Inc., to dismiss case is DENIED.

ENTER:

BY THE COURT

entered 10/16/1997

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE